No. 83-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT M. CAVANAUGH, and
MARTHA E. CAVANAUGH,

Petitioners,

v.

WESTERN MARYLAND RAILWAY COMPANY
AND BALTIMORE AND OHIO
RAILROAD COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Fourth Circuit Court of Appeals correct in ruling that where a railroad employee negligently damages his employer's property, the railroad's state law property damage claim against the employee is not barred by the Federal Employers' Liability Act and can be asserted as a compulsory counterclaim in an F.E.L.A. suit filed by the employee arising out of the same transaction or occurrence as the property damage?

2. Should this Court deny the Petition for Certiorari to the Fourth Circuit Court of Appeals for the following reasons:

   a. The decision below gave full consideration to the issues and decided them correctly;

   b. The petitioner's arguments are without merit;

   c. The issues decided are not likely to recur often, and therefore are not of sufficient national importance to warrant review by this Court;

   d. The questions are not ripe for decision by this Court since the scarcity of lower court decisions deprives this Court of a thorough delineation of the issues in a sufficient variety of factual circumstances;

   e. The second question presented by Petitioners with regard to the propriety of a setoff was not raised or decided below; and

   f. There has been insufficient factual development in the trial court for this Court to determine which respondent is the employer, and therefore the matter should not be reviewed by this Court at this time.

PARTIES

Petitioners have correctly described the parties.

A listing of parent and subsidiary corporations of respondents is given below.

(A) Western Maryland Railway Company

Parents — The Chesapeake and Ohio Railway Company (direct)
CSX Corporation (indirect)

Subsidiaries and affiliates (other than wholly-owned)

The Baltimore and Cumberland Valley Railroad Extension Company
Trailer Train Company

(B) Baltimore and Ohio Railway Company

Parents — The Chesapeake and Ohio Railway Company (direct)
CSX Corporation (indirect)

Subsidiaries and affiliates (other than wholly-owned)

The Akron and Barberton Belt Railroad Company
The Akron Union Passenger Depot Company
Allegheny and Western Railway Company
The Baltimore and Philadelphia Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
The Lakefront Dock and Railroad Terminal Company

The Monangahela Railway Company
Richmond-Washington Company
Richmond, Fredericksburg and Potomac Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company

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OPINIONS IN THE COURTS BELOW

The Opinion of the Fourth Circuit Court of Appeals in this case is reported at 729 F.2d 289 (1984). The opinion of the District Court for the Northern District of West Virginia was not published. A transcript of that Court's verbal ruling and the orders entered by it appear in the appendix to the petition.

STATEMENT OF THE CASE

Petitioners Robert M. Cavanaugh and Martha E. Cavanaugh filed a Complaint and an Amended Complaint in the United States District Court for the Northern District of West Virginia alleging, among other things, a right to recover under the Federal Employers' Liability Act, 45 U.S.C. §§51, *et seq.* (hereinafter "F.E.L.A.") against respondents Western Maryland Railway Company (hereinafter "Western Maryland") and Baltimore and Ohio Railroad Company (hereinafter "B&O"). This cause of action arose out of a February 12, 1980 head-on collision of two trains near Orleans Road, West Virginia. Petitioner Robert H. Cavanaugh was the engineer of one of the trains involved.

The petitioners alleged in their Complaint and Amended Complaint that Robert M. Cavanaugh was employed by the respondents, "or one of them, as a railroad engineer." In their answer to the Amended Complaint, the respondents admitted that Robert M. Cavanaugh was employed by respondents, *"or one of them,* as a railroad engineer." (emphasis added). No evidence has yet been presented in the District Court from which that Court could determine whether petitioner Robert Cavanaugh was an employee of Western Maryland, B&O, or both, and no such determination has yet been made by that Court.

The complaints allege that Robert Cavanaugh suffered severe personal injuries in the Orleans Road collision. The respondent railroads, as a result of the collision, sustained property damage in the approximate amount of $1,700,000.00, which included damage to diesel locomotive units, cars and trailers, track and related appurtenances, costs of rerailing cars and locomotives, and other related damages. The railroads filed a counterclaim against plaintiff Robert M. Cavanaugh in that amount on the ground that said collision and ensuing property damage were solely and proximately caused by the negligence, carelessness, and wanton and reckless misconduct of petitioner Robert M. Cavanaugh in his violation of railroad operating rules, his failure to obey an approach signal, his running of a stop signal, and other negligence.

The petitioners filed a motion to dismiss the railroads' counterclaim. By order dated June 16, 1982, this motion was granted by District Court Judge Robert E. Maxwell on the theory that the defendants' state law claim was barred by F.E.L.A. Also in that order, the Court certified, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there was no just reason for delay of entry of final judgment and directed the Clerk to enter a final appealable judgment dismissing the counterclaim. The final judgment order was appealed by the railroads to the Fourth Circuit Court of Appeals.

In an opinion written by Circuit Judge Donald Russell and joined in by Circuit Judge Robert F. Chapman, the Fourth Circuit reversed and held that nothing in F.E.L.A. proscribes the railroads' state law property damage counterclaim and also directed that the F.E.L.A. case and the counterclaim be tried separately. Circuit Judge K. K. Hall dissented.

The Circuit Court's opinion begins by recognizing the well established common law rule that an employer has a right of action against his employee for damage to the employer's property which was proximately caused by that employee's negligent acts. The opinion also notes that this right exists under West Virginia law as is demonstrated in *National Grange Mutual Insurance Co. v. Wyoming County Insurance Agency, Inc.*, 195 S.E.2d 151 (W.Va. 1973).

The Court also pointed out in a footnote that the issue of whether either or both of the railroads was the "employer" as that term is used in F.E.L.A. would have to be resolved by the District Court once all the facts which affect that determination are a part of the record. See at 729 F.2d at 290n.3.

The Circuit Court then analyzed the petitioners' assertions that this state law property damage claim is barred by either Section 5 or 10 of F.E.L.A. (45 U.S.C. §§55 and 60, respectively). Section 5 invalidates "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter." The Fourth Circuit, relying upon the text and the legislative history of this statute, correctly concluded that the railroad's property damage claim is obviously not the type of "device whatsoever" which the Congress intended to bar with this statute.

Section 10 of the Act, which was also relied upon by petitioners below, proscribes any "device" the "purpose, intent or effect" of which is to "prevent employees . . . from furnishing voluntarily information . . . as to the facts incident to the injury or death of any employee." In the words of the Circuit Court:

> As the language plainly indicates, this section was intended to prevent the railroad from making inaccessible to an injured employee other railroad employees whose testimony might be helpful to an injured employee if he chose to sue the railroad. 729 F.2d at 293.

The Court astutely described petitioners' contention that this straightforward statute should be stretched to bar the railroads' claim as follows:

> It would seem that the plaintiff is saying that all railroad employees who have any knowledge of an accident must be given immunity from liability lest they be prevented "from voluntarily furnishing information" in support of plaintiff's action by the threatened possibility that they too would be sued by the railroad for their responsibility in connection with the accident. We cannot believe that Congress had any such far-fetched purpose in enacting Section 10. 729 F.2d at 293.

Having disposed of petitioners' demand that Sections 5 and 10 of the Act be rewritten to bar the railroads' claims, the Circuit Court proceeded to an analysis of the very few cases on this issue, most of which are unpublished. The Court declined to follow a Washington state case relied upon by the petitioners, *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 615 P.2d 457 (Wash. 1980). It relied instead upon *Kentucky & Indiana Terminal Railroad Co. v. Martin*, 437 S.W.2d 944 (Ky. 1969); *Capitola v. Minneapolis, St. Paul & Sault Ste. Marie Railroad Co.*, 103 N.W.2d 867 (Minn. 1960), and *Cook v. St. Louis-San Francisco Railway Co.*, 75 F.R.D. 619 (W.D. Okla. 1976), and on several unpublished decisions, which were cited to the Court pursuant to Rule 18(d) (iii) of the Fourth Circuit's local rules which provides that unpublished decisions may be cited

where they have great precedential value and where no published opinion would serve as well. The Court then rightly concluded that "In the contest of the precedents . . . the balance tilts sharply in favor of the allowability of the counterclaim herein. More important for us, though, reason and justice support that view." 729 F.2d at 294.

SUMMARY OF ARGUMENT

The respondents submit that the Fourth Circuit Court of Appeals was clearly correct in its reading of the F.E.L.A. and that this Court need not review their decision. Respondents also submit that, in any event, granting certiorari in this case would be premature since there has been so little development in this area of law either in federal or state courts. Contrary to petitioners' fears that "thousands of railroad employees" will be affected, respondents believe this issue will seldom arise. However, should the question be litigated further in other cases in the future, this Court at that time will have a better basis for appraising the matter than is available at present. Furthermore, respondents point out that petitioners are not entitled to a review of the second issue presented in the petition, concerning setoff, because the issue was not raised, discussed, or decided below and, in any event, petitioners' contention on the point is wholly without merit. In sum, the Fourth Circuit Court of Appeals gave full and fair consideration to the issues presented below and decided them in a manner consistent with both applicable law and public policy. The petition for writ of certiorari thus should be denied.

ARGUMENT

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT AND NEED NOT BE REVIEWED BY THIS COURT.

The rationale underlying the ruling of the Circuit Court is the simple but important idea that the law should provide a remedy to a party whose property has been damaged by another. The petitioners argue that this universally recognized foundation of tort law should be abrogated by this Court in situations where the party whose property was damaged is a railroad and where the tortfeasor is a railroad employee who has filed an F.E.L.A. suit alleging he was injured in the same incident which resulted in the property damage. Petitioners' claim is that the Federal Employers' Liability Act was intended to exculpate railroad employees who negligently damage their employer's property if they happen to be injured in the process. The Fourth Circuit quite properly rejected these contentions and found that the Act has no such intent or effect.

The common law has long recognized that an employer may sue an employee for tortious injury to its property. As the Circuit Court noted, this well accepted, though perhaps seldom used, rule is the law in West Virginia. *National Grange Mutual Insurance Co. v. Wyoming County Insurance Agency, Inc.*, 195 S.E.2d 151 (W.Va. 1973). The petitioners in the Court below attempted to distinguish the *National Grange* case on the ground that it involved a principal and agent rather than a master and servant. However, the Circuit Court recognized that this is a distinction without a difference. There is no reason to apply a different rule of tort liability to an employe who is labeled as an agent from that applied to an employee who is labeled a servant. It is nothing short of absurd to propose that West Virginia law requires agents to use due care in carrying out their duties to their principals but exempts servants from exercising due care in carrying out their duties to their masters.

The Court below also recognized that once the petitioner had filed a lawsuit arising out of the same collision which resulted in the railroads' property damage claim, the railroad was compelled to assert its claim in the same action, or else the claim would have been lost under the compulsory counterclaim provisions of Rule 13 of the Federal Rules of Civil Procedure:

> It follows that if the railroads in this case are denied the right to assert their claim against the plaintiff by way of a counterclaim, they could be denied any right of action ever to recover for the damages to their property suffered as a result exclusively of plaintiff's negligence and the plaintiff in turn could be given absolute immunity from any liability for his negligence both in this action and in any other action begun after judgment in the present action.
>
> It is difficult to believe that such an unfair result is compelled. 729 F.2d at 291.

Having established that the railroad had a valid state law claim which was compulsory under Rule 13, the Circuit Court then turned to an analysis of the petitioners' assertion that the claim was barred by the Federal Employers' Liability Act. In briefing and argument in the Circuit Court, the petitioners asserted that the railroads' state law counterclaim was barred by Sections 5 and 10 of the Act. (45 U.S.C. §§55 and 60, respectively). In the petition for writ of certiorari, the petitioners have proffered arguments based on other portions of the Act which were not raised below and have all but abandoned their reliance on Section 10.

This discussion will first focus on the petitioners' contentions with regard to Section 5. That statute voids contracts or other devices intended to release a carrier from F.E.L.A. liability. Petitioners' theory is that the counterclaim is a "device" designed by the railroad to exempt itself from liability in the petitioners' F.E.L.A. claim. In so doing, petitioners fail to apprehend the simple fact that the railroad's property damages are very real. They are not some fictional "device" malignly designed to deprive petitioner of anything. The railroads expect to be able to prove that as a direct result of wrongful conduct by petitioner, Robert

Cavanaugh, over $1,700,000.00 worth of locomotives, cars and trailers, track, and other items were damaged or destroyed. The railroads' demand for compensation for this damage is not a "device" barred by Section 5 but rather is a legal right which the Fourth Circuit quite properly protected.

The Court below understood that Section 5 was not intended to bar legitimate counterclaims but rather was obviously intended to prevent abuses such as fraudently procured releases, onerous employment contracts with waivers of F.E.L.A. remedies, and the like. This intention of Congress is clearly demonstrated in the legislative history of the statute. In the House of Representatives debate on the proposed Act, Representative Richard Wayne Parker dissented on the question of §55 as follows:

> It makes void all arrangements of settlement of such insurance as between employer and employee, and such systems, however much abused in the past are susceptible of great good and should be regulated rather than abolished. Cong. Rec. (1908) p. 4436 *et seq.*

This passage clearly reveals that Congress in passing §55 was concerned about specific alleged abuses in the settlement and insurance practices of the railroad industry. House Report No. 1386, set forth in Cong. Rec. (1908), p. 4436 *et seq.*, indicates that Congress meant the section to redress abusive employment contract provisions:

> Mr. Sterling. . .
>
> This provision is necessary in order to make effective Section 1 and 2 of the bill. Some of the railroads in the country insist on a contract with their employees discharging the company from liability for personal injuries.
>
> In any event, the employees of many of the common carriers of the country are today working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration, we quote one paragraph from a blank form of applica-

tion for a situation with the American Express Company, and entitled "Rules Governing Employment by This Company":

> I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employees, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators, with the payment of said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claims or in defending the same, including all counsel fees and expenses of litigation connected therewith.

This extract from the legislative history clearly demonstrates that the evil which Congress was attempting to redress in this section was various devices, such as language in applications for employment which acted as waivers or limitations on the employee's right to sue the railroad. It was in no way aimed at legitimate property damage claims of railroads against negligent employees.

Searching the Act for another means by which they could escape liability for the tortious destruction of respondent's property by Robert Cavanaugh, petitioners in their argument below also relied heavily upon Section 10 of the Act (45 U.S.C. §60). The text of the section quite clearly demonstrates that it was intended to prohibit railroads from trying to prevent employees from giving truthful evidence about accidents:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports. 45 U.S.C. §60.

The Fourth Circuit recognized that petitioners' arguments on Section 10 amounted to an assertion that if railroad workers are not given complete immunity from liability for their torts, they will refuse to give truthful testimony in investigation of accidents. The Fourth Circuit quite correctly held that this was not the purpose of the statute.

Perhaps because the Fourth Circuit recognized the fallacies inherent in the arguments based on Sections 5 and 10 of F.E.L.A., the petitioners herein now assert that the counterclaim violates other sections of the statute which were not raised below.

Petitioners now rely on Section 3 of F.E.L.A. (45 U.S.C. §53). They repeatedly assert that under Section 3, it is improper to "reduce" a plaintiff's recovery for his injuries except by the percentage of his own negligence, and not even that if the railroad has violated a safety statute. This is, of course, true, but it ignores the fact that the railroad's claim is not a "reduction" of plaintiff's award but rather a separate claim for separate — but very real — damages arising out of a separate body of law, and for which the railroad is entitled to a remedy, just like any other

litigant. The petitioners apparently believe that the railroads' legitimate property damage claim must be barred because if a jury grants an award on both the petitioners' F.E.L.A. claim and on the counterclaim, the petitioners will end up with less money in their pockets than they would have had if the property damage claim was barred. The absurdity of petitioners' position can be seen when one realizes that this same logic would also bar a countersuit by the employing railroad against its employee on a promissory note or other contract, or even would prohibit a civil action for conversion if the employee had stolen railroad property. If petitioners' reasoning is applied, such claims, like the counterclaim for property damage herein, would operate to "reduce" an F.E.L.A. recovery in violation of Section 3. This is obviously not a proper interpretation of the Act.

Petitioners also contend that if the Fourth Circuit is not reversed, national uniformity in the litigation of F.E.L.A. claims will be impaired because state laws on contributory or comparative negligence vary. Again, petitioners fail to understand that the employee's right to litigate his F.E.L.A. claim for personal injuries is not affected by the decision below. It is only the *employer's* right to litigate its state law claim for property damage which was dealt with and upheld by the Fourth Circuit.

Petitioners also now rely upon a fourth portion of F.E.L.A., Section 6 (45 U.S.C. §56) which permits F.E.L.A. plaintiffs three years in which to file their actions and which allows them to sue in either federal or state court. The petitioners argue that the ruling below will impermissibly undermine this statute by allowing the railroads to file suit first in their own choice of forum long before the running of the limitations period. This argument presumes that Rule 13(a) would supersede Section 6 of the Act and make the F.E.L.A. claim a compulsory counterclaim in a property damage suit initiated by the railroad. Obviously, this is not the case, since it is well established that the federal rules are procedural only and cannot alter substantive rights. 28 U.S.C. §2072. The Courts thus can protect a F.E.L.A. plaintiff's Section 6 rights simply by holding that the statute prevails over the rule and that the F.E.L.A. claim would not be a compulsory counterclaim in a property damage action brought by a railroad.

In fact, one federal district court has already correctly resolved a similar problem, *Cook v. St. Louis-San Francisco Railway Co.*, 75 F.R.D. 619 (W.D. Okla. 1976). The *Cook* case involved a head-on collision of two trains which the railroad believed was caused by the negligence of two employees, both of whom were injured. One employee filed an F.E.L.A. suit in federal court, and one filed his suit in state court. When the railroad counterclaimed for property damage in the federal court proceeding, the right to counterclaim was upheld. However, when the railroad moved to join the employee who filed his F.E.L.A. action in state court as a defendant on the counterclaim in the federal court action, the district court refused to permit the joinder. The rationale of the district court was that the railroad would not be prejudiced by litigating its property damage counterclaim against the state court F.E.L.A. plaintiff in the forum chosen by that F.E.L.A. plaintiff pursuant to his rights under Section 6. This case illustrates that the Courts can and will protect F.E.L.A. plaintiffs' right to choice of forum and time of suit. Therefore, the petitioners' fears that Section 6 will be undermined by the decision of the Circuit Court are groundless.

In addition to these arguments based on various sections of F.E.L.A., petitioners also take issue with the Fourth Circuit's decision that the balance of precedents weighs in favor of respondents. Petitioners count one published and one unpublished opinion to their credit [*Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 615 P.2d 457 (Wash. 1980) and *Shields v. Consolidated Rail Corp.*, No. 81 Civ. 4204 (S.D.N.Y. 1981)] and disparage the three published and two unpublished opinions against them [*Capitola v. Minneapolis, St. Paul, & Sault Ste. Marie Railroad Co.*, 103 N.W.2d 867 (Minn. 1960), *Kentucky & Indiana Terminal Railroad Co. v. Martin*, 437 S.W.2d 944 (Ky. 1969), *Cook v. St. Louis-San Francisco Railway Co.*, 75 F.R.D. 619 (W.D.Okla. 1976); *Consolidated Rail Corp. v. Dobin*, No. 81-2539 (E.D.Pa. 1981) and *Key v. Kentucky & Indiana Terminal Railroad Co.*, No. C78-0313-L(A) (W.D.Ky. 1979)] as containing insufficient discussion of the issue. Perhaps the most striking conclusion which can be drawn from these seven cases found by the parties is that this issue is apparently *very rarely litigated.* This constitutes one important reason why the petition should be denied, both because there has been insufficient development

of the question by the lower courts for this Court to study and because the scarcity of cases indicates the matter is simply not of sufficient national importance to merit review by this Court.

In addition, a brief review of the decisions permitting the prosecution of a property damage counterclaim in an F.E.L.A. action demonstrates clearly the dubiousness of petitioners' predictions of dire calamities flowing from the holding of the Circuit Court. There are two published state court decisions in which the Courts permitted the counterclaims to be heard and the railroads did not recover because of their own contributory negligence: *Capitola v. Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., (supra)* and *Kentucky & Indiana Terminal Railroad Co. v. Martin, (supra).* These cases were decided in jurisdictions where contributory negligence is a complete bar. Petitioners apparently fear that the availability of a property damage counterclaim will affect numerous F.E.L.A. plaintiffs. Respondents submit that this is unlikely. In strict contributory negligence jurisdictions, as in the cited cases, the railroad's claim will be completely barred if it was negligent at all, and the railroad will only recover in situations where the accident was solely due to the plaintiff's own negligence. In such cases, the plaintiff has no valid F.E.L.A. claim anyway. In pure comparative negligence jurisdictions, a railroad's property damage claims will still be reduced by its proportion of fault. And in states with modified comparative negligence, such as West Virginia, the property damage claim may be barred altogether if the railroad is substantially at fault. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va. 1979).

When one subtracts from the totality of all F.E.L.A. cases: (1) that large proportion where no property damage occurred, (2) that proportion where even if property damage did occur the injured employee was not negligent or did not cause the accident,and (3) that proportion where any property damage claim is barred or severely reduced by the railroad's own negligence, the respondents believe that only a very few cases will remain. And those few cases will be the ones where the employee's negligence was so gross and the railroad's conduct so free from fault that public policy would demand that the employee bear the losses he caused.

The third published case relied upon by the Fourth Circuit is *Cook v. St. Louis-San Francisco Railway Co., (supra).* As is noted above, the *Cook* decision illustrates, among other things, that a Court can uphold a railroad's right to sue for property damage and still protect an injured employee's right to choose his forum.

The respondents also cited three unpublished decisions to the Fourth Circuit: *Van Cleve v. Consolidated Rail Corporation,* No. 79 CV-01-93 (Ohio 1979);[1] *Key v. Kentucky & Indiana Terminal Railroad Co., (supra);* and *Consolidated Rail Corp. v. Dobin, (supra).* Interestingly, like the case at bar, all three of these cases involved collisions between two trains. Of the three, the opinion of District Judge J. William Ditter, Jr. of the Eastern District of Pennsylvania in the *Dobin* case is perhaps the most helpful. In the *Dobin* case, an engineman and conductor were in the cab of a locomotive which ran into the rear of a stopped freight train, killing both men. Based upon the facts disclosed in the National Transportation Safety Board Report, it appeared that the conductor may have been under the influence of marijuana and actually operating the train at the time. In the F.E.L.A. action which arose from these deaths, the railroad filed a counterclaim against the conductor's estate for damage to railroad property. This was dismissed without prejudice, and another action was filed against the conductor's estate and was assigned as a related case to the judge handling the F.E.L.A. action. The conductor's estate filed a motion to dismiss the railroad's counterclaim as contrary to the provisions of F.E.L.A. By an order filed September 29, 1981, District Judge J. William Ditter, Jr. denied the motion to dismiss. He held as follows:

> There is a common law right of action by a master against its servant "for property damage arising out of ordinary acts of negligence committed within the scope of employment." *Stack v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 94 Wash. 2d 155, 615 P.2d 457, 459 (1980); *Greenleaf v. Huntingdon & B.T.M.R. & Coal Co.*, 3 F.R.D. 24, 25 (E.D.Pa., 1942).

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[1] *Van Cleve* was not cited by the Fourth Circuit and was conveniently omitted from the Petition. The order in that case is appended hereto.

> The Federal Employers' Liability Act (F.E.L.A.) 45 U.S.C. §51 et seq., sets forth the grounds under which a railroad employee may recover from its employer for personal injury incurred while working. The provisions of the FELA do not abrogate the railroad's common law right against its employees for property damage caused by their negligence.
>
> I decline to adopt the reasoning of *Stack*, that a suit by a railroad against its employee for property damage is a "device whatsoever" either designed to relieve the railroad of liability or to prevent other employees from furnishing voluntary information regarding the facts incident to the injury or death of the defendant employee. *Stack, supra,* at 459-61. See 45 U.S.C. §§55 & 60 (1972). *See also Kentucky & Indiana Terminal R.R. Co. v. Martin,* 437 S.W.2d 944 (Ky.) (1969) (bifurcated approach adopted in trial of employee FELA claim and railroad counterclaim for property damage).

Petitioners urge that because the Supreme Court of Washington's decision conflicts with that of the Fourth Circuit in this case, this Court must grant certiorari to resolve the conflict. Respondents submit that because federal court decisions interpreting the Federal Employers' Liability Act control over state court decisions, there is no actual conflict. *Bowman v. Illinois Central Railroad Co.,* 142 N.E.2d 104 (Ill. 1957), cert. den. 355 U.S. 837; and *State ex rel Burlington Northern Inc. v. District Court of the Eighth Judicial District,* 548 P.2d 1390 (Mont. 1976). The decision of the Fourth Circuit Court of Appeals is now the ruling law on this point, and no further guidance from this Court is necessary unless and until another federal Circuit Court of Appeals disagrees with the decision below.

One final point raised by petitioners needs to be addressed. Petitioners conceded that the drafters of F.E.L.A. may never have

considered the issue presented herein (an odd assertion since they also argue that four sections of the Act apply). (Petition, p.15) They then contend that even so, this Court should read a prohibition of respondents' claim into the Act, regardless of Congressional intent. Respondents submit that while F.E.L.A. was meant to be construed liberally by the courts, it is not the province of the judiciary to deny respondents their legitimate state law rights on so flimsy a basis. As Judge Russell put it in the opinion below:

> The plaintiff, however, finds lurking obscurely in the language of Sections 5 and 10 a legislative purpose to interdict counterclaims by defending railroads in FELA suits because the filing of such counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action. As we have already observed, there is nothing in the language of the Act or its legislative history that supports this reasoning. More than that, there is no authority for an assumption that the possibility of a counterclaim being filed creates an unfair advantage in favor of the defendant or improperly coerces or intimidates the injured party from seeking redress for his injuries. Certainly Congress, in the course of enacting FELA never expressed any interest in denying to the defendant railroad the right of counterclaim because of any assumed prejudice thereby caused to the plaintiff in an FELA action and we do not think we should try almost eighty years after the FELA was originally enacted to read a prohibition of a counterclaim by the defending railroad into Sections 5 or 10 on some fanciful notion that the maintenance of the counterclaim will prevent or prejudice the injured railroad employee in securing a fair award at the hands of the jury. The same argument could be advanced against the admissibility of a counterclaim in any tort action.
>
> 729 F.2d at 293-294.

Respondents submit that this resolution of the question by Judge Russell is so clearly correct that there is no reason for this Court to consider the issue further.

II.

THERE HAS BEEN INSUFFICIENT FACTUAL DEVELOPMENT BELOW FOR THIS MATTER TO BE RIPE FOR FURTHER REVIEW.

Even assuming solely for the purposes of argument that the Circuit Court erred, and F.E.L.A. can be somehow construed to bar a property damage counterclaim in a F.E.L.A. action, the counterclaims still could not be properly dismissed prior to a factual determination as to who was the employer, and therefore the matter is not mature for review by this Court.

As is noted in the Statement of Case, the pleadings indicate that neither the petitioners nor the respondents have been able to resolve the question of whether the petitioner Robert M. Cavanaugh was, for purposes of F.E.L.A., employed by the B&O, by Western Maryland, or by both on the day of the accident. In order for the Federal Employers' Liability Act to apply to a case, the F.E.L.A. plaintiff must establish that he was "employed" by the defendant railroad at the time of his injury. (45 U.S.C. §51). In "borrowed servant" cases, the determination of who is the "employer" is often a complex one. As the Court held in *Stevenson v. Lake Terminal Railroad Co.* 42 F.2d 357 (6th Cir., 1930):

> The Congressional failure to define the term "employee" in either the Safety Appliance Acts (45 USCA §1 et seq.) or the Federal Employers' Liability Act (45 USCA §§61-59) has evoked a large amount of litigation . . . . It is, however, settled that, if the injured person was not in the employ of the defendant, the action fails . . . .And the Supreme Court has held that the term "employee" in the Employers' Liability Act describes the conventional relation of master and servant . . . .This relation is usually dependent upon the right to direct the manner in which the work should be done . . . or, stated differently, its existence is determined by ascertaining whose work was being performed at the time of the injury . . . .Selection and engagement, payment of wages, and the power of dismissal are relevant but not conclusive; direction and control of the work being done usually are determinative. . . . 42 F.2d at 358-359 (Citations omitted).

Clearly the question of who is the employer in this case depends on a variety of facts and circumstances which are not yet a part of the record. It is therefore apparent that this question will have to be resolved by the District Court as a matter of law, once the relevant facts have been admitted into evidence.

Because of its decision that F.E.L.A. does not bar the counterclaim, the Circuit Court was not required to confront this problem. See 729 F.2d at 290n.2. However should this Court grant certiorari, it would inevitably be enmeshed in trying to hypothesize about what the evidence may show as to who is the employer since obviously a non-employing railroad should not be barred from asserting a property damage counterclaim against a person who has tortiously damaged its property. The Federal Employers' Liability Act applies only when there is an employer/employee relationship between the plaintiff and the defendant. As was held in *Kentucky & Tennessee Railway Co. v. Minton,* 180 S.W. 831 (Ky. 1915):

> By the express terms of the Employers' Liability Act, the carrier is liable to its employees only, for negligence resulting in their injury. The Courts have no power to extend its liability under the statute to one not its servant, he being a stranger to it. . . . It was certainly the intention of Congress, enacting the statute, *supra,* to limit the beneficiaries thereunder to those only sustaining the relationship of servant to the master. 180 S.W. at 835.

Under the case law, then, the provisions of the Federal Employers' Liability Act can have no applicability to a railroad who is not the employer of the F.E.L.A. plaintiff. If, as seems likely, it is determined in this case that one of the respondent railroads is not the employer of Robert Cavanaugh for purposes of F.E.L.A., that railroad clearly has the right to assert a state law claim against the petitioner Robert M. Cavanaugh for any damage to its property which is found to have resulted from his tortious conduct. Additionally, it should be noted that if the petitioner is held to have been the sole cause of the accident, he is barred from a recovery under F.E.L.A., and even the employing railroad would clearly have a right to proceed on its property damage claim. The presence of these factors clearly militates against granting certiorari at this stage of the instant case.

III.

THE SECOND QUESTION PRESENTED BY PETITIONERS RAISES ISSUES WHICH WERE NOT BRIEFED, ARGUED, OR DECIDED BELOW, AND THEREFORE THE MATTER SHOULD NOT BE CONSIDERED BY THIS COURT TO BE AN APPROPRIATE SUBJECT FOR REVIEW.

The petition phrases the second "Question Presented" as follows:

> Whether the Federal Employers' Liability Act prohibits a railroad from satisfying any judgment it receives in a negligence action against an injured employee from that employee's F.E.L.A. award.

It must first be noted that this question is not properly before this Court because it was not raised or decided below. The decisions of this Court clearly indicate that this Court sits to review decisions of lower courts and will not decide questions not raised or resolved below absent extraordinary circumstances. *Duignan v. United States,* 274 U.S. 195 (1927); *California v. Taylor* 353 U.S. 553 (1957); *Lawn v. United States,* 355 U.S. 339 (1957); *Youakin v. Miller,* 425 U.S. 231 (1976); and others. No such extraordinary circumstances are present in this case. Nothing prevented the petitioners from raising and developing the issue below, and no constitutional or other substantial rights of petitioners will be prejudiced by the refusal of this Court to consider the matter. And, in any event, petitioners' contentions on this point are without merit.

It is unclear from the petition whether petitioners are asking simply for a ruling that the District Court may not order an award on the counterclaim to be set off against an award on the F.E.L.A. claim or whether the petitioners are requesting a more drastic and extraordinary ruling. Some of the language in the petition seems to demand a holding that the railroad could not pursue its state law post-judgment remedies of attachment, execution, garnishment, etc. against any portion of the F.E.L.A. award or any property purchased therewith. If petitioners are requesting

only a holding that the District Court may not order a setoff, it would seem that the chief result of such a ruling would be to make collection of the property damage award more cumbersome without providing petitioners with any real protection against collection. If the petitioners are requesting a much more drastic and wholly unprecedented ruling to the effect that the award is entirely insulated from any state law procedures for collecting on judgments, such a rule would be a nightmare to practically apply and would also constitute a massive interference with state law procedures which is entirely unwarranted. If petitioners are seriously contending that the award should be entirely insulated, the practical problems are legion. Presumably, the property damage award could be collected from property held by the petitioners prior to the action. Respondents can envision no practical procedure by which they would be able to distinguish which property of their debtor they would be permitted to levy against and which they would not. This problem demonstrates both that the petitioners' contention is without merit and that it has been insufficiently developed as a theory to justify this Court in taking its time to consider it.

In support of this extraordinary contention, petitioners cite only the case of *Baker v. Gold Seal Liquors,* 417 U.S. 467 (1974) which is not even remotely on point. *Baker* is not an F.E.L.A. case at all. It is a bankruptcy case which creates a very limited exception to the general bankruptcy rule permitting a creditor to set off claims he has against the bankruptcy debtor against any claim which the trustee may assert against him. This exception is made in *Baker* for a reorganization of a railroad because of the public interest in the survival of the carrier. The effect of the ruling was not to completely bar the creditor's claim from being collected from the bankrupt railroad's assets, but rather to give the creditor's claim a different priority. There is nothing in *Baker* which even hints that F.E.L.A. should be construed to bar a setoff in this case.

Petitioners also assert that because Section 5 of the Act (45 U.S.C. §55) allows a setoff of insurance premiums paid by a railroad that "no other setoff is permitted by the statute." (Petition p. 23). This is a misrepresentation of the language of the section. The statute does not mention any other setoff, but contains nothing to bar such.

Respondents submit that neither the *Baker* case nor the text of the Act give any support at all for petitioners' extraordinary proposal. This Court should not grant certiorari to review this matter.

CONCLUSION

It is apparent that for a number of reasons this matter does not merit the granting of a writ of certiorari. The Fourth Circuit Court of Appeals carefully evaluated the issues before it and has rendered a decision which is in conformity with the legislative history of the Federal Employers' Liability Act, with the mainstream of judicial thought on the issue, and with public policy. This is apparently a very rarely litigated issue, which is not likely to occur in a sufficient number of cases to merit this Court's attention. Furthermore, because of the limited factual development below, if the Court were to grant review, remand for the taking of additional evidence would almost certainly be necessary. And finally, the petitioners' second argument is not properly before this Court because the issue was not raised or decided upon below, and in any event their contentions on the point are without merit. For all of these reasons, the petition for writ of certiorari to the Fourth Circuit Court of Appeals should be denied.

Respectfully submitted,

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APPENDIX A

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Robert Van Cleve	:	
Plaintiff	:	
vs.	:	Case No. 79CV-01-93
Consolidated Rail Corporation	:	
Defendant	:	

DECISION ON MOTION TO DISMISS COUNTERCLAIM

Rendered this 26th day of July, 1979.

GILLIE, J.

There is no language in any part of the Federal Employers' Liability Act which by expression or implication relates to or in any way concerns itself with the right or lack thereof of an employer to press a claim against an employee for alleged negligence of the employee. The Federal Employers' Liability is directed entirely to an enlightened and modified re-statement of the age-old case-drawn principles of master-servant common law, as that law touches upon an employee's right to recover for injuries caused by an employer's negligence.

Plaintiff argues further, and separately from his assertion that the Federal Employers' Liability Act applies, that by the interaction of the Federal Employers' Liability Act with Ohio Common law in the event both are applied appropriately, defendant could not recover from plaintiff in any finding possible to the Court. While this may be true, the Court finds thereby no reason why defendant may not pursue its counterclaim.

Plaintiff's motion to dismiss defendant's counterclaim is overruled.

/s/ William T. Gillie

William T. Gillie, Judge

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that served the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by mailing true copies thereof by depositing the same in the United States mail, postage prepaid, at Huntington, West Virginia, on the 29th day of June, 1984, to:

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